IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-44

WILLIAM JOSEPH McMURTREY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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The Petitioner, William Joseph McMurtrey, Jr., prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above case on May 13, 1976.

OPINION BELOW

The Petitioner, William Joseph McMurtrey, Jr., was found guilty of violating 21 U.S.C. § 841 (a)(1) and 846, in a nonjury trial before the Honorable Judge H. Kenneth Wangelin on September 16, 1975, in the District Court for the Eastern District

of Missouri, in Cause No. 76-1046. Count I charged conspiracy to distribute marijuana and Counts II and III charged possession of marijuana with intent to distribute. On January 9, 1976, William Joseph McMurtrey, Jr., was sentenced to five years imprisonment on each count. The sentences were to run concurrently.

On January 9, 1976, the petitioner filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit. On April 12, 1976, that court, in a *per curiam* decision, affirmed the District Court decision. Although the decision is not reported a copy is included in Appendix A.

JURISDICTION

The judgment that is sought to be reviewed is the final order issued in the United States Court of Appeals for the Eighth Circuit on April 12, 1976.

Petitioner's Motion for a Rehearing was denied on June 4, 1976, and this court granted an extension of time to and including July 13, 1976 to file this petition. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The issues presented for review in this Petition for Certiorari are:

1. Were the petitioner's Fourth Amendment rights violated when the District Court expanded the concept of third party consent to a warrantless search?

2. Was the United States Court of Appeals for the Eighth Circuit in error when it affirmed the District Court which had

applied principles wholly different from those recently applied by the Eighth Circuit in a case which was indistinguishable on it facts?

STATEMENT

Petitioner, along with Edward August Ochel V, was indicted by a federal grand jury for the violations of 21 U.S.C. § 841 (a)(1) and 846. The first count charged conspiracy to distribute marijuana. Counts II and III charged possession of marijuana with the intent to distribute.

The petitioner and Edward August Ochel V had been acquaintances prior to this incident. At the time of the incident, Edward August Ochel V was living with his mother, Frances Ochel, on her farm in Wright City, Missouri. Their residence and a shed were set off from the rest of the farm by a fence. His mother and his father, Edward August Ochel, IV (hereinafter "Ochel Sr."), were separated and no longer living together. They had been separated since October or November, 1974. Since that time Ochel, Sr., had lived in places other than their jointly owned farm.

At the time of the Ochel's separation, Mrs. Ochel was to remain in the house, apparently under the belief, according to Ochel, Sr., that he "would eventually occupy the house again because it was convenient to (his) work." (Tr. 5). However, from the time of the separation to the time of the arrest of Ochel V, Ochel, Sr. did not live on the farm, and had entered the shed in question only three or four times, when neither his wife nor his son were present. The shed was connected to and under the same roof as the house. Mrs. Ochel had no knowledge of Ochel, Sr., entering the house except to pick up clothes which he had left, and never gave him permission to come in the house after he moved out. Mr. Ochel had, however, removed certain tools from the shed.

Near the end of May, 1975, Ochel, Sr. was on the farm property and noticed a padlock on the shed, which had never been locked previously. He removed the hasp, entered the shed, and found two plastic garbage bags which contained a vegetable substance. He took this substance to Special Agent Randall Oither of the Drug Enforcement Administration. The vegetable substance was later determined to be marijuana.

A few days later Ochel, Sr., noted that the lock on the shed had been removed. But on approximately June 17, 1975, Ochel, Sr., again was at the farm and noticed that the shed was again locked. He removed the hasp from the door, and found 14 or 15 large bales within the shed. He then contacted Special Agent James McDowell of the Drug Enforcement Administration.

On approximately June 18, 1975, Agent McDowell went to the farm with Mr. Ochel. Ochel, Sr., again removed the hasp. Ten bales remained in the shed. Shortly thereafter, several Federal agents arrived in the vicinity of the farm. Later that day, petitioner McMurtrey and Ochel V were seen to remove three bales, place them into a car. As they drove toward the agents, they were both arrested. All ten bales were later determined to be marijuana. No search warrant was ever issued. The government contends that the consent to the warrantless search by Ochel, Sr., obviates the need to comply with search warrant requirements.

REASONS FOR GRANTING THE WRIT

1. This Case Presents an Outstanding Opportunity for the United States Supreme Court to Form the Parameters of the Consent Exception to the Fourth Amendment Requirement That a Search Must Be Preceded by a Proper Warrant.

No one questions the authority of a third party under some conditions to consent to a search of the property of another. But the courts have not clearly enunciated what that third party's relationship to the one subject to the search must be. Certainly a third party who has a possessory right to the object of the search can give consent to that search. *Coolidge v. New Hampshire*, 403 U.S. 443 (1970). That concept has recently been reaffirmed in *United States v. Matlock*, 415 U.S. 164 (1973). There, the Court said that "permission to search (may be) obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock, supra*, at 171.

The problem becomes one of defining "common authority," and what it means with respect to a third party. Mr. Justice White wrote:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1973).

In this case, Ochel, Sr. no longer had anything more than a property interest in the farm. He was separated from his wife and had lived away from the farm for at least eight months. Although he had worked on the farm, he had not been inside the fence which surrounded the residence and the shed more than three or four times after the separation, and had not gone inside the fenced area when anyone else was present. The very nature of a padlock is evidence that another desires not to have particular items under third party scrutiny. At the time of the arrest Ochel, Sr., had no more than a property interest in the farm. No longer did he have mutual use of the property. Ochel, Sr. did not have joint access to the shed or house at this time.

To allow this case to stand would greatly broaden a previously-limited exception to the requirement of a proper search warrant as a precedent to a search. Federal courts have been staunch in their support of the concept that consent to a search by a third party must be predicated on some sort of joint control.

That staunchness, and the desire to prevent warrantless searches except under carefully delineated exceptions, has been shown often. In *Holzhey v. United States*, 223 F. 2d 823 (5th Cir. 1955), the court held that evidence required by a warrantless search of a locked cabinet in a home was inadmissible even when consent had been given by persons who owned the residence, but who did not have joint control of the cabinet. In a recent District Court case, the Court held that even a person with whom a defendant left a locked metal box, without key, for purpose of safekeeping did not have authority to consent to a search of a locked box. *United States v. Niggs*, 396 F. Supp. 610 (M.D. Pa. 1975). And in *Government of Virgin Islands v. Gereau*, 502 F. 2d 914, 926 (3rd Cir. 1974), the court said "Authority to consent does not, for Fourth Amendment purposes, turn on ownership of the property searched . . . An owner or user of property can consent to a search of that property . . .

only if the relationship of each person to the property demonstrates that the non-consenting user assumed the risk that such consent might be given. (Citing *Matlock v. United States, supra.*") The padlock on the shed is evidence that there was no assumption of a risk that consent to a search be given. As noted in Wright, *Federal Practice and Procedure*: Criminal § 669 at 88:

> "Since the (Supreme Court) in other contexts has now come to recognize that the Fourth Amendment is not concerned with property rights, but rather with a right to privacy, possession and control of property seem irrelevant to a power to consent to search."

Not only would the consent exception to the search warrant requirement be broadened, but, additionally, to allow this case to stand would be a step in the chipping away of the vital constitutional safeguard that a search warrant is to be issued only upon a determination of probable cause by a neutral and detached magistrate. One needn't be especially creative to imagine situations in which, for instance, a landlord, due only to his property interest, might be allowed to consent to the warrantless search of a tenant's premises. Law enforcement agents would easily be able to circumvent the requirement of a magistrate, because there would be a distinct possibility that one holding a property interest would be more susceptible to the pleas of law enforcement agents than would a United States Magistrate. The exception would swallow up the rule.

Thus, to determine what sort of relationship a third party must have to another person for the purposes of consenting to a warrantless search of the other's property and effects, and so that situations not be given the opportunity to arise which would obviate the need for neutral and detached magistrates in the warrant process, the Supreme Court should grant this petition.

2. **The Decision of the Court of Appeals for the Eighth Circuit Is Contrary to the Principles Applied by the Same Circuit in United States v. Heisman, 503 F. 2d 1286 (8th Cir. 1974).**

In *United States v. Heisman*, 503 F2d 1286 (8th Cir. 1974), the court held involved a warrantless search of a counterfeiting defendant's room in a commercial building that wasn't even protected by a door or a lock. Consent to a warrantless search had been given by Kesterson, the defendant's co-lessee. Kesterson's bare legal rights did not rise to a level of common authority over the room. The court found that the "area (was) set aside for (Heisman's) private use . . . Kesterson did not have access or control of Heisman's room for any purpose . . . Kesterson had a legal but not a possessory right to the area in which Heisman stored his work product. Thus, Kesterson could not legally consent to the search of that area." *United States v. Heisman, supra* at 1288.

Admittedly, the facts of the present case and their application to petitioner McMurtrey differ in one aspect from those of *Heisman*. McMurtrey, himself did not have a property interest in the Ochel shed. But that fact is of no consequence in view of the "automatic standing concept recognized in *Brown v. United States*, 411 U.S. 223 (1973), *Simmons v. United States*, 390 U.S. 377 (1968), and *Jones v. United States*, 362 U.S. 257 (1960). Since McMurtrey was charged with possession of the property seized, he automatically had standing to assert the Fourth Amendment right.

Whatever legal right Ochel, Sr., had to the shed area at the time of the arrest in the instant case, it is clear that he no longer had any possessory right. He had given up the possessory right to those that lived on the farm—Frances Ochel, his wife, and Ochel V. The Court of Appeals for the Eighth Circuit applied the principles of possessory interest vigorously in *Heisman* and thus refused to allow evidence obtained from the war-

rantless search to be admitted into evidence. In this case, where the third party who consented to the warrantless search also did not have a possessory interest, the Eighth Circuit saw fit to admit the evidence. A contradiction exists which needs to be clarified by the United States Supreme Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 76-1046

No. 76-1078

United States of America,
Appellee,

v.

William Joseph McMurtrey, Jr., and Edward August Ockel, V,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 12, 1976

Filed: May 13, 1976

Before Van Oosterhout, Senior Circuit Judge, Lay and Webster, Circuit Judges.

Per Curiam.

Defendants McMurtrey and Ockel were charged in a three count indictment with violations of § 841(a)(1) and § 846 of Title 21, U.S.C. Count I charged conspiracy to distribute marijuana and Counts II and III charged possession of marijuana with intent to distribute.

Defendants entered pleas of not guilty and filed a motion to suppress evidence. Each defendant voluntarily waived a

right to a jury trial. By agreement the motion to suppress was considered with the trial on the merits.

The case was tried to the court, Judge Wangelin presiding. The court, after a full evidentiary hearing, denied the motion to suppress and found each defendant guilty on each of the three counts and imposed concurrent sentences of five-years imprisonment upon each defendant on each count, to be followed by a special parole term of two years. Each defendant has taken a timely appeal from his conviction and sentence. The appeals were consolidated for briefing and argument.

The critical issue raised by the appeals is whether Edward Ockel, Sr., had authority to consent to the search by Government agents of a shed on his farm.

Mr. and Mrs. Ockel, Sr., own a sixteen hundred acre farm operated by Mr. Ockel. They lived in the house located on the farm. Marital difficulties developed between them in the fall of 1974. Mr. Ockel left the home but continued to operate the farm. Immediately adjoining the house is a storage shed with an outside entrance but no entrance to the house. Small tools, a chain saw, painting equipment, garden tools and a little of everything were stored in the shed. Mr. Ockel testified he had been in the shed three or four times since leaving the house. Mrs. Ockel testified she did not know whether the tools remained in the shed after Mr. Ockel had left. There is no testimony that Mr. Ockel relinquished his possessory right to the shed or any other building after leaving the house.

The trial court filed a memorandum opinion, reported at 405 F. Supp. 777 (E.D. Mo. 1975), which makes detailed and extensive findings of fact. As stated by the trial court at p. 779 of 405 F.Supp., it is well-established law that a warrantless search may be made upon the basis of consent obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects

sought to be inspected. *United States v. Matlock*, 415 U.S. 164, 171 (1974); *see United States v. Heisman*, 503 F.2d 1284, 1289 (8th Cir. 1974).

Judge Wangelin, upon the basis of his findings of fact, determined:

> The facts adduced at trial do not clearly indicate whether or not Mr. Ockel, Sr. had given up his residence at the house on his farm. However, the evidence clearly indicates that he had not given up his rights to access to the shed near the house on the property. Mr. Ockel, Sr. kept various tools, and lawn and garden equipment, in the shed, which he used to maintain the lawn around the house and for other work on the farm. Neither Mr. Ockel, Sr. or Mrs. Ockel had rented the property to their son, defendant Ockel. [405 F. Supp. at 778-779.]

We have carefully examined the record. The foregoing determination is supported by substantial evidence and is not clearly erroneous. The record clearly reflects that Ockel, Sr. broadly consented to all searches made.

Defendants raise the additional issue that the failure of the Government to obtain a search warrant after the defendants were arrested and prior to the seizure of the marijuana in the shed without a warrant violates their constitutional rights and that the Count III evidence should be suppressed. We hold that the broad consent to enter the premises given by Mr. Ockel, Sr. remained in effect at the time the marijuana was taken from the shed.

The judgments appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

No. 76-44

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM JOSEPH MCMURTREY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 534 F. 2d 1321 (Pet. App. A-1 to A-3). The decision of the district court is reported at 405 F. Supp. 777.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing was denied on June 4, 1976. On June 15, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to July 13, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the lawful owner of property, who enjoys a continuing right of access to the property, may consent to a search of that property.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Missouri, petitioner and Edward August Ockel were convicted on one count of conspiring to distribute marijuana and two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. Each was sentenced to concurrent terms of five years' imprisonment on each count, followed by a two-year term of special parole. The court of appeals affirmed *per curiam* (Pet. App. A-1 to A-3).

Before trial, petitioner and his co-defendant moved to suppress marijuana seized by federal officers from a shed on a farm owned jointly by Ockel's parents and operated by his father.

Prior to the search, Ockel's parents had developed marital difficulties and Ockel's father apparently moved out of the house (Pet. App. A-2).[1] He nevertheless continued to operate the farm and used the shed on several occasions. The shed immediately adjoined the house and was used for storage of small tools, a chain saw, painting and garden equipment, and similar materials. The shed could not be entered through the house but only through its own independent entrance. *Ibid*

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[1]While the court of appeals assumed that Mr. Ockel had left the house, the district court stated: "The facts adduced at trial do not clearly indicate whether or not Mr. Ockel, Sr. had given up his residence at the house on his farm" (405 F. Supp. at 778).

The district court found that in May 1975 Ockel's father had become suspicious of certain material in the shed and had requested the Drug Enforcement Agency to inspect the shed (405 F. Supp. at 778). DEA agents then conducted several searches with Mr. Ockel's consent and uncovered the marijuana on which the instant convictions were based (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that Ockel's father could not consent to a search of the shed on his farm and that the marijuana found by the government agents should have been suppressed. This contention is without merit. In *United States* v. *Matlock*, 415 U.S. 164, 171, this Court stated that permission to search may be "obtained from a third party who possessed common authority over or other sufficient relationship to the premises * * * to be inspected." The district court in this case found that Ockel's father "had not given up his rights to access to the shed" (405 F. Supp. at 778) and that he "kept various tools, and lawn and garden equipment, in the shed, which he used to maintain the lawn around the house and for other work on the farm" (*id.* at 779). That relationship was sufficient to give him authority to consent to a search of those premises. Moreover, petitioner concedes (Pet. 5) that the district court utilized the proper legal test and merely differs with its application to these facts. That question does not warrant further review.

2. Furthermore, petitioner was without standing to contest introduction of the evidence on the conspiracy count. Petitioner concededly had no possessory right or other recognizable interest in the shed, or in the property on which the shed was located (Pet. 8). While the concept of "automatic" standing, which is in our view outdated, arguably might confer standing to contest the evidence

with regard to the possession counts (*Brown* v. *United States*, 411 U.S. 223), the conspiracy count does not depend upon the evidence of possession itself. Thus, petitioner's argument at most applies to two of the three counts for which he received identical concurrent sentences.[2]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1976.

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[2]This Court stated in *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16: "Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U.S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, 382 U.S. 136, 138 (1965)."